IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR TOWNSLEY, Administrator of the Estate of John H. Keylor, Deceased, Plaintiff,	:	CIVIL ACTION
v.	:	
WEST BRANDYWINE TOWNSHIP and WEST BRANDYWINE TOWNSHIP POLICE DEPARTMENT, Defendants.	:	No. 06-758

Baylson, J. **April 26, 2006**

I. Introduction

This case arises from the tragic suicide of John H. Keylor ("Decedent"). Plaintiff Edgar Townsley ("Plaintiff"), the executor of Decedent's estate, seeks to recover damages for alleged violations of Decedent's constitutional rights as guaranteed by the Fourteenth Amendment. Presently before this Court is a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. No. 2), filed by Defendants West Brandywine Township and West Brandywine Township Police Department (collectively, "Defendants"). For the reasons set forth below, the Motion to Dismiss will be granted.

II. Factual Background

On October 26, 2003 at approximately 10:15 p.m., non-defendant police officers responded to a call concerning a head-on car collision on Route 82 in West Brandywine Township, Pennsylvania, where they arrested and charged Decedent with a DUI. Pl's Compl. at

¶ 7. Intoxicated, Decedent was placed in a holding cell at West Brandywine Township Police Department in plain sight of Defendants' employees. Id. at ¶ 9. While in the holding cell, Decedent attempted to hang himself with his clothing. Id. at ¶ 11. Defendants' employees discovered Decedent hanging by his clothing, removed his clothes, and left him in the cell, but they did not seek psychiatric help for Decedent. Id. at ¶¶ 12-14. Defendants thereafter released Decedent into the custody of a third party, a friend of Decedent, and Defendants did not make the third-party aware that Decedent had attempted suicide. Id. at ¶¶ 20. The individual took Decedent to his home, where he was left alone. Id. at ¶ 22. On the morning of October 27, 2006, Decedent committed suicide. Id.

In his Complaint, Plaintiff sets forth five separate Counts. Plaintiff asserts in Count I of the Complaint that Defendants violated 42 U.S.C. § 1983 by depriving Decedent of his rights guaranteed by the Fourteenth Amendment. Id. at ¶¶ 24-31. In Count II, Plaintiff asserts that Defendants are liable under the special relationship theory because Defendants violated their affirmative duty to protect Decedent after placing him in custody by failing to properly monitor him while he was in the holding cell, failing to provide him with adequate medical treatment, and failing to warn the friend about the attempted suicide. Id. at ¶¶ 32-40. In Count III, Plaintiff alleges that the Defendants are liable under the state-created danger theory for failing to warn the third-party about what had transpired while Decedent was in detention and thus exposed Decedent to a dangerous situation that otherwise would not have occurred. Id. at ¶¶ 41-48. In Counts IV and V, Plaintiff asserts liability under state law for negligence and wrongful death.

III. Jurisdiction and Legal Standard

A. Jurisdiction

This Court has federal question jurisdiction under 28 U.S.C. § 1331, as this action is brought pursuant to 42 U.S.C. § 1983 and Plaintiff alleges violations of Decedent's federal constitutional rights. This Court also has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, to consider Plaintiff's state law claims.

Venue is appropriate in this district, pursuant to 28 U.S.C. § 1391, because the claim arose in this judicial district.

B. Legal Standard

When deciding a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court may grant the motion only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, the plaintiff is not entitled to relief. Doug Grant, Inc. v. Great Bay Casino Corp., 232 F.3d 173, 183 (3d Cir. 2000). Accordingly, a federal court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001).

IV. Parties' Contentions

Defendants argue that the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). With regard to the denial of federal Constitutional rights pursuant to § 1983 (Count I), they argue that Plaintiff has failed to state a Monell claim because he does not specify an official policy that authorized police officers to ignore detainees with mental illness. See Def. Mot. to

Dismiss at 3. Rather, according to the Defendants, Plaintiff has only averred a general policy for failure to train police officers about detainees' psychological needs.

Next, Defendants contend that the court should dismiss Plaintiff's special relationship claim (Count II) because Decedent was not in state custody when the act of suicide occurred. Id. at 6. Defendants released Decedent into the custody of a third party before the suicide, which took place at Decedent's residence. Defendants highlight that Plaintiff does not allege that Decedent suffered harm or injury while under Defendants' control. Id. at 8. Thus, according to Defendants, the special relationship theory is inapplicable. Id.

As for the state-created danger claim (Count III), Defendants argue that Plaintiff has failed to state a claim because the Defendants did not use their authority to affirmatively create an opportunity for a crime to occur that otherwise would not have existed. Id. at 9. Defendants contend that they did not affirmatively create the danger of suicide by Decedent by releasing him into the custody of a third party nor were they under an obligation to provide Decedent with long-term care. Id. at 11. In sum, Defendants argue that Plaintiff fails to plead that Defendants caused Decedent's condition or caused him to commit suicide.

Finally, Defendants argue that this Court should dismiss the state claims in Counts IV and V pursuant to the Pennsylvania Political Subdivision Tort Claims Act ("Tort Claims Act"). Def's Mot. to Dismiss at 14. Defendants assert that they are immune from the state law claims because negligence and wrongful death claims are not one of the eight exceptions to the general governmental immunity. Id. at 14-15.

In response, Moreover, Plaintiff maintains that the Defendants "systematically exhibited deliberate indifference to [Decedent's] frailties to their advantage to compel continued

cooperation." Id. at 3 (internal quotations omitted). Plaintiff asserts that the Defendants ought to have responded to Decedent's attempted suicide by exploring the Decedent's mental state, so as to prevent Decedent from both attempting and being successful at any possible future suicide act. Id. at 5.

Plaintiff further argues that he has adequately alleged a municipal liability claim under § 1983 against the Defendant Township and Police Department as he is not required to name individuals for their conduct to support a Monell claim. Id. at 10. Plaintiff contends that the Defendants failed to maintain adequate suicide prevention policies that translated into a failure to properly tend to Decedent's needs after his attempted suicide. Id. at 8. According to the Plaintiff, Defendants do not have the proper training "concerning mental health issues, indications of suicidal behavior/ideation, supervision and proper intake procedures to secure the safety needs of detainees such as this one when exhibit [sic] such suicidal ideation." Id.

Plaintiff also argues that even though the state generally does not have a duty to protect an individual from harm caused by private individuals, the special relationship and state-created danger exceptions apply here. Pl's Response at 2-3. Under the special relationship theory, Plaintiff argues that Decedent first attempted suicide while in Defendants' "express custody." Id. at 7. As for the state-created danger theory, the Plaintiff argues that Decedent's death was a fairly direct result of Defendants' actions as they were "well-aware of Plaintiff Decedent's extreme vulnerability with respect to suicide." Id. at 5. Similarly, Plaintiff argues that Defendants knew or should have known (from his behavior while incarcerated) that the Decedent could act rashly once released from custody. Id. at 4.

V. Discussion

A. Denial of Federal Constitutional Rights Pursuant to § 1983

Count I of Plaintiff's Complaint raises § 1983 Constitutional claims against West Brandywine Township, which is a municipality. For the following reasons, Count I must be dismissed because it fails to plead any facts supporting Plaintiff's allegation of the existence of an official policy or custom endorsing the Defendants' misconduct.[1]

To establish a violation of 42 U.S.C. § 1983 by a municipality, a plaintiff must show that the alleged misconduct was caused by an official government custom or policy. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978). Municipal custom or policy can be demonstrated either by reference to express, codified policy or by evidence that a particular practice, although not authorized by law, is so permanent and well-settled that it constitutes law. Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996). Further, Plaintiff must demonstrate causation, as "a municipality can be liable under § 1983 only where its policies are the moving force behind the constitutional violation." City of Canton v. Harris, 489 U.S. 378, 389 (1989) (internal quotations omitted).

Additionally, for liability to attach under a failure to train theory, Defendants' failure to

[1] As a threshold matter, Defendants contend that West Brandywine Police Department is not a legal entity existing separate and apart from West Brandywine Township. Plaintiff does not refute this assertion. Therefore, West Brandywine Police Department, as the sub-division of defendant West Brandywine Township, is not a proper defendant in this action. See Martin v. Red Lion Police Dep't, 146 Fed. Appx. 558 (3d Cir. 2005) (citing Johnson v. City of Erie, 834 F. Supp. 873, 878-79 (W.D. Pa. 1993) ("Since the police department is not a separate and distinct legal entity, it is not a person within the meaning of 42 U.S.C. § 1983 and is not a proper defendant here."); Young v. Keohane, 809 F. Supp. 1185 (M.D. Pa. 1992). The Court will therefore dismiss the claims against West Brandywine Township Police Department. The Court's discussion, infra, is therefore limited to Defendant West Brandywine Township.

train its employees must "reflect a 'deliberate' or 'conscious' choice by [the] municipality" such that one could call it a policy or custom. Id. at 388-89; Grazier v. City of Philadelphia, 328 F.3d 120, 124 (3d Cir. 2003). This standard will not be satisfied by a mere allegation that a training program represents a policy for which the city is responsible, but rather, the focus must be on whether the program is adequate to the tasks the particular employees must perform. Harris, 489 U.S. at 389-90. Moreover, such liability arises "only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants." Id.

Mindful of these principles, the Court finds that Plaintiff has not satisfied his burden of alleging facts sufficient to support the claim of municipal liability. Although Plaintiff alleges in the Complaint that Defendant West Brandywine Township Police Department and West Brandywine Township Chief of Police (Walt Werner, who is not a named Defendant) directly control the police policies, procedures, practices and training concerning the arrest and detention of suspects within the Township and its facilities, the Complaint lacks any factual allegations 1) referencing the "conduct, time, place, and persons responsible for" any official municipal policy or custom endorsing the police officer Defendants' conduct; or 2) identifying a direct causal link between such a policy and a violation of his rights. Evancho v. Fisher, 423 F.3d 347, 353 (3d Cir. 2005). Instead, Plaintiff's Complaint summarily asserts that the Defendants "as a matter of policy and practice, failed to train their police personnel concerning the safety and psychological needs of incarcerated persons in their custody," without referencing any specific facts supporting the "who," "what," and "how" of that allegation. Moreover, although Plaintiff in part proceeds on a failure to train theory, he avers nothing demonstrating how the existing program is

inadequate to the tasks of the particular employees or suggesting the Defendant Township evinced "deliberate indifference" to Plaintiff's rights.

The Court is aware of Plaintiff's "informational disadvantage." See Alston v. Parker, 363 F.3d 229, 233 (3d Cir. 2004) (noting that the "need for discovery before testing a complaint for factual sufficiency is particularly acute for civil rights Plaintiff, who often face informational disadvantages."). We recognize that, as a private litigant, Plaintiff lacks ready access to Defendants' records without discovery. Id. However, lacking detailed information about police policies does not give Plaintiff license to make bold assertions without any factual backing at all. In fact, under Rule 11 of the Rules of Civil Procedure, Plaintiff has an obligation to only assert claims for which "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." F.R. Civ. P. 11(b)(3). Plaintiff must aver some – even if not yet detailed – facts to support his claim.

The Court will therefore dismiss Count I with prejudice as to Defendant West Brandywine Township Police Department and without prejudice as to Defendant West Brandywine Township. Plaintiff, however, is given leave to amend the Complaint against West Brandywine Township within twenty (20) days to plead specific facts supporting (1) a specific policy or custom, (2) a direct causal link between the policy and Plaintiff's harm, and (3) the Defendants 'deliberate indifference' with regard to failing to train, if he can do so within the provisions of Rule 11.[2]

[2] The Court notes that Defendants also argue that the Court should dismiss Plaintiff's Monell claim, presumably with prejudice, because Plaintiff has not named any individual police officers as defendants in this lawsuit. Defendants cite Williams v. Borough of West Chester, 891 F.2d

B. Special Relationship Theory

Count II of Plaintiff's Complaint arises out of the special relationship theory. Plaintiff asserts that Defendants had an affirmative duty to act to protect Decedent's constitutionally protected interests because Decedent was in the state's control or custody. However, the Court finds that this claim must fail because Decedent's harm occurred after the relationship between Decedent and Defendants was severed by the release of Decedent to a third-party.

In general, state actors have no affirmative obligation to protect citizens from injuries caused by themselves or others. Cannon v. City of Philadelphia, 86 F. Supp. 2d 460, 465 (E.D. Pa. 2000). In DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), the United States Supreme Court noted that the Due Process Clause generally "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do come to harm through other means." Id. at 195. The special relationship theory is one exception to this rule. The theory dictates that "when the State takes a person into

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458, 467 (3d Cir. 1989) for the proposition that "[i]f a person has suffered no constitutional injury at the hands of [any] individual police officer, the fact that the departmental regulations might have authorized [unconstitutional action] is quite beside the point."

However, in Williams, the Court found at summary judgment stage that no liability could exist as to the municipality because it found that none of its individual officers actually engaged in any unconstitutional conduct. Here, although Plaintiff has chosen to not name any individual police officers as defendants, Plaintiff has averred that individual officers of the police department and township, acting in furtherance of the polices, practices and customs of the municipal defendant, did indeed engage in unconstitutional conduct. At the motion to dismiss stage, this is sufficient to state a cognizable claim. None of the cases cited by Defendants holds that the individual police officers referenced in the Complaint must be named as individual Defendants. Should the Court or a jury later find that here no individual police officers actually engaged in any unconstitutional conduct pursuant to municipal policy, then Williams would apply and the basis for Plaintiff's Monell claim would disappear.

its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." Id. at 199-200.

In DeShaney, the Supreme Court defined custody as "the State's affirmative act of restraining the individual's freedom to act on his own behalf . . . ." Id. at 200. The United States Court of Appeals for the Third Circuit has interpreted custody to require physical custody. See D.R. v. Middle Bucks Area Vocational Sch., 972 F.2d 1364, 1372 (3d Cir. 1992) (special relationship does not exist between students and school officials because it does not meet the requisite physical custody). Such is the case when an individual is incarcerated, institutionalized or placed in foster care. DeShaney, 489 U.S. at 200; see Nicini v. Morra, 212 F.3d 798, (3d Cir. 2000) (holding that a special relationship is created when a state places a child into "state-regulated foster care"). Critically, the Supreme Court has specifically noted that "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." DeShaney, 489 U.S. at 201. "To create a special relationship, the 'state must affirmatively act to curtail the individual's freedom such that he or she can no longer care for him or herself.'" Henderson v. City of Philadelphia, 1999 WL 482305 (E.D. Pa. 1999) (citing Regalbuto v. City of Philadelphia, 937 F. Supp. 374, 379-80 (E.D. Pa. 1995), aff'd, 91 F.3d 125 (3d Cir. 1996)).

It logically follows that the state's custody over an individual terminates when the state no longer restrains the individual from being able to care for himself – *i.e.*, when the individual is no longer in the state's physical custody. See Henderson v. City of Philadelphia, 1999 WL 482305 (E.D. Pa. 1999) (explaining that a special relationship exists only in the limited

circumstances, and at the time that, the state has a person in custody or otherwise prevents a person from helping themself);

Here, Decedent was in Defendants' custody while he was detained in the holding cell, but that custodial relationship ended – prior to Decedent's harm – because Defendants properly released Decedent into the custody of a third-party friend. The harm that occurred to Decedent took place well after he was released from custody. Precedent dictates that upon releasing Decedent, Defendants no longer had a duty to protect him.[3] Because Defendants were no longer responsible for protecting Decedent, it was simply not their legal obligation to warn the third party of what transpired while Decedent was detained or to somehow seek private psychiatric treatment for Decedent. As such, the Court finds that no special relationship existed between the Decedent and Defendants when he committed the act of suicide.[4]

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[3] An analogous case is Mroz v. City of Tonawanda, 999 F. Supp. 436 (W.D.N.Y. 1998). In Mroz, Plaintiff's claims were based in relevant part on the fact that police, after briefly having taken an emotionally disturbed sixteen year-old boy who had even threatened suicide into custody, sent the boy home and told him to stay there until his parents arrived home. After being released, the boy committed suicide. In dismissing Plaintiff's claim, the court recognized that while pretrial detainees have a right to "some level of care and protection, including protection against suicide," the pretrial detainee must be in the custody of the police. The Court found that, having been released from police custody, the boy was no longer under the control of the police defendants at the time he committed suicide. See also, e.g., Schoenfeld v. City of Toledo, 223 F. Supp. 2d 925 (N.D. Ohio 2002) (holding that the city did not have an affirmative duty to protect a detainee who committed suicide after police released him, even though the subject had earlier attempted to purchase a gun and his wife had communicated his suicidal ideations).

[4] Plaintiff argues that Decedent was entitled to enhanced medical and psychiatric treatment during his brief detention. Although Plaintiff points to a violation of Decedent's constitutionally protected interests under the Fourteenth Amendment, we look to the definition of the deliberate indifference standard as applied to Eighth Amendment violations for guidance under the facts of this case. Mere allegations of malpractice nor mere disagreement as to the proper medical treatment support a claim of deliberate indifference to a serious medical need in violation of the Eighth Amendment. Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1978). Here, during Decedent's brief detention, Defendants (who were supervising

Accordingly, the Court will dismiss Count II with prejudice.

C. State-Created Danger Theory

Count III of Plaintiff's Complaint raises § 1983 Constitutional claims against the Defendants under the state-created danger theory, which requires a state actor to affirmatively protect an individual's constitutionally protected interests when the state has placed the individual in danger. The Court find that Count III must also be dismissed because the Defendants did not use their authority to create an opportunity for harm to come to the Decedent that otherwise would not have occurred.

The state-created danger theory is rooted in dicta in DeShaney. In DeShaney, the state actor was not held liable for the severe beating a minor child received after the State returned him to his father's custody. Id. at 191. The Supreme Court noted that "[w]hile the State may have been aware of the dangers that [a minor] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." Id. at 201. Based on this language, many Courts of Appeals have adopted versions of the state-created danger theory.

The Court of Appeals for the Third Circuit adopted the theory in Kneipp v. Tedder, 95 F.3d 1199, 1201 (3d Cir. 1996), and set forth a four-prong test to establish liability. Recently, the Third Circuit modified the test to incorporate modifications to the original four elements. Bright v. Westmoreland County, 2006 WL 851770 (3d. Cir. April 4, 2006). The four elements of a meritorious state-created danger claim of liability include:

Decedent) stopped Decedent's suicide attempt and possibly prevented another immediate attempt by removing his clothing. These actions do not rise to the level of "deliberate indifference."

> (1) the harm ultimately caused was foreseeable and fairly direct;
> (2) a state actor acted with a degree of culpability that shocks the conscience;
> (3) a relationship between the state and the plaintiff existed such that "the plaintiff was a foreseeable victim of the defendant's acts," or a "member of a discrete class of persons subjected to the potential harm brought about by the state's actions," as opposed to a member of the public in general; and
> (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Id. at *4. The Court will proceed directly to discussion of the fourth element, because it is dispositive here.[5]

The question under the fourth element of the state-created danger test is whether "the state actor used his authority to create an opportunity for danger that otherwise would not have existed," Rivas v. City of Passaic, 365 F.3d 181, 195 (3d Cir. 2004), or "whether a state actor's behavior constituted an affirmative act, and, if so, whether the affirmative act created a foreseeable opportunity for harm." Bright, 2006 WL 851770 at n. 7. In Bright, the Third Circuit clarified that only a state actor's *affirmative acts* may be found to satisfy the fourth element. Id., at *4. "It is misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause." Id. The Bright court unequivocally concluded that "'state actors' cannot 'use their authority' to create [ ] an opportunity [for harm] by failing to act." Id., at n. 6.[6]

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[5] The Court notes that Plaintiff's claim likely also fails the second prong of the state-created danger theory because the Defendants' actions, taken as a whole, do not "shock the conscience."

[6] In Bright, Annette Bright, a minor, was murdered by a criminal defendant who received probation after he pled guilty to a charge of corrupting the morals of Annette's older sister. Id. at *1. An employee of Westmoreland County Adult Probation Department witnessed the defendant violate his probation as he was found unsupervised with Bright's sister in a local store. Id. The employee reported the incident, but the probation revocation hearing was delayed ten weeks. During that time, the defendant shot and killed Annette Bright. Id. at *2. The Plaintiff, Annette's father, filed constitutional and state law claims against the state actors. Id. at *1. Under the state-created danger theory, the plaintiff alleged that:

Moreover, "an affirmative act, while necessary, is not sufficient. The test also requires a direct causal relationship between the affirmative act and foreseeable harm to the plaintiff." Id., at n. 7. This causation element is very difficult to establish when the harm is caused by suicide. Sandford v. Stiles, 2004 WL 2579738 (E.D. Pa. Nov. 10, 2004); see also Henderson v. City of Philadelphia, 1999 WL 482305 (E.D. Pa. July 12, 1999) (holding that plaintiff failed to establish fourth prong of the Kneipp test where defendant police officers did nothing to prevent Decedent's mother from coming to Decedent's aid).

Here, therefore, the Court must determine whether Plaintiff has alleged that Defendants used their authority to place Decedent in greater danger than he had already faced. Stated differently, the Court must ask whether Plaintiff has alleged that Defendants affirmatively acted so as to create an opportunity that otherwise would not have existed for harm to come to Decedent.

> the state actor-defendants caused Annette Bright's death in three ways: (1) the "inexplicable delay" by numerous state actors in pursuing the revocation of [the criminal defendant's] parole left him in a position to kill Annette; (2) Officer Franzaglio's assurance that [the criminal defendant] would be taken into custody was relied upon by Bright and resulted in Bright's failing to take steps to protect Annette; and (3) Officer Whalen's confrontation of [the criminal defendant] in May and the want of any prompt follow-up by the state actors "emboldened" him to commit a crime he otherwise would not have committed.

Id. at *5. The District Court granted summary judgment to the defendants on the state-created danger theory because the plaintiff only pointed to the state actors' failure to act (rather than an affirmative act as having caused a foreseeable harm to Annette). Id. at *5-6. The Third Circuit affirmed, explaining (in addition to the language cited above) that "[i]f there were any inconsistency in the holding of our prior cases regarding the fourth element of the state-created danger claim, the controlling precedent would be our en banc decision in D.R. by L.R. v. Middle Bucks Area Vo. Tech. School, 972 F.2d 1364 (3d Cir. 1992). . . . [W]e there affirmed what DeShaney clearly teaches: the Due Process clause proscribes only state action and, accordingly, liability 'under the state-created danger theory [can only] be predicated upon the state's affirmative acts which work to plaintiffs' detriment in terms of exposure to danger.'" Bright, 2006 WL 851770 at n.6.

Applying the principles discussed above, the Court finds that Plaintiff has failed to set forth any facts from which a reasonable jury could conclude that Defendants used their authority to affirmatively create an opportunity for harm to befall Decedent.[7] The Court finds that Defendants did not affirmatively place Decedent in harms way by arresting him and then releasing him to the custody of a third person (who returned Decedent to his home). Indeed, Plaintiff has demonstrated no causal link between Decedent's suicide and the Defendants' prior arrest and release of Decedent for a relatively minor crime. In short, after Defendants released Decedent into the custody of a responsible third-party, Decedent was in no worse a position than had the Defendants not arrested him at all. Cf., e.g., Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993) (noting the need under this doctrine to show that the state actors rendered someone more vulnerable to a danger than they would otherwise have been absent state action). Here, Defendants simply did not create an opportunity for harm to come to the Decedent through their affirmative acts.

[7] Several other courts in this judicial district have reached similar conclusions in recent years. In Sandford, 2004 WL 2579738, a school guidance counselor had not intervened after being informed of a student's suicidal threat. The Court found that the guidance counselor did not use her authority to create an opportunity that would not have otherwise existed for harm to come to the student. The Court applied the standard set forth in Smith v. Marasco, 318 F.3d 497, 510 (3d Cir. 2003), "whether 'but for defendants' actions, the plaintiff would have been in a less harmful position." The Court concluded that the guidance counselor had done "nothing to affirmatively create the danger." Similarly, in Leidy v. Borough of Glenolden, 277 F. Supp. 2d 547 (E.D. Pa. 2003), police permitted a fugitive attempting to surrender to leave the police station (due to an error). Six days later, the fugitive strangled and raped two individuals. The Court considered whether placing wanted fugitive who was attempting to surrender back on the street created an opportunity for harm to occur. The Court concluded that it did not, because the fugitive posed no greater danger to others than he had before he came to the police station. The Court explained that "[w]here police officers t[ake] insufficient measures to avert or control private violence, courts have not deemed the loss of life or liberty to be the result of state action." Id. at 561. Accordingly, the Court found that the plaintiff's claims amounted to a failure to protect, and, without more, must be denied. Id.

According to the Third Circuit's holding in Bright, a state actor's failure to act – no matter how callous or irresponsible it may appear – is not to be considered in evaluating liability under the state-created danger theory. Therefore, Plaintiff's allegations concerning Defendants' "failure" to either seek private psychiatric treatment for Decedent or warn the third party of Decedent's attempted suicide are thus not a proper basis for liability under the state-created danger theory, and, therefore, are not sufficient to sustain Count III of the Complaint.[8]

The Court will therefore dismiss Count III with prejudice.

D. State Law Claims

Counts IV and V of Plaintiff's Complaint raise two state law claims over which, Plaintiff asserts, this Court has supplemental jurisdiction. However, because the Pennsylvania Political Subdivision Tort Claims Act ("PSTCA"), 42 Pa.C.S. § 8541, et seq. affords immunity to the Defendants, Counts IV and V must be dismissed.

Defendants argue that the state claims are barred by immunity provisions set forth in the PSTCA. Def's Mot. to Dismiss at 14-15. Pursuant to that statute, local agencies, such as townships, and their employees acting in their official capacities, are generally immune from tort liability unless the alleged misconduct fits into one of a few narrow categories enumerated in the statute. 42 Pa.C.S. §§ 8541-42. The PSTCA grants broad immunity to municipal defendants based on intentional conduct, only waiving it with respect to eight narrow categories of "negligent acts," specifically:

[8] Even if this court were to treat Defendants' failure to seek additional treatment and failure to inform the third party as affirmative acts, these particular "acts" nonetheless did not create a foreseeable opportunity of harm for Decedent. It simply cannot be assumed that Decedent would not have committed suicide but for Defendants' failures.

> (1) Vehicle liability.–The operation of any motor vehicle in the possession or control of the local agency . . . (2) Care, custody or control of personal property . . . (3) Real property . . . (4) Trees, traffic controls and street lighting . . . (5) Utility service facilities . . . (6) Streets . . . (7) Sidewalks . . . (8) Care, custody or control of animals.

Id. at § 8542(b). Moreover, suits against municipal employees acting in their official capacities are "treated as claims against the municipal entities that employ these individuals." Hafer v. Melo, 502 U.S. 21, 25 (1991).

None of the eight PSTCA negligence theory exceptions applies to Plaintiff's state law claims of negligence and wrongful death. Accordingly, because the PSTCA affords immunity, the Defendants cannot be held liable. Counts IV and V must be dismissed with prejudice.

VI. Conclusion

For the reasons stated supra, this Court finds that Plaintiff has not alleged sufficient facts to state viable claims against Defendants. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR TOWNSLEY, Administrator of the Estate of John H. Keylor, Deceased, Plaintiff,	:	CIVIL ACTION
v.	:	
WEST BRANDYWINE TOWNSHIP and WEST BRANDYWINE TOWNSHIP POLICE DEPARTMENT, Defendants	:	No. 06-758

ORDER

AND NOW, this 26th day of April 2006, upon consideration of the pleadings and briefs and based on the foregoing Memorandum, it is hereby ORDERED that Defendants' Motion to Dismiss (Doc. No. 2) is disposed of as follows:

1. Count I is dismissed without prejudice and with leave granted to Plaintiff to file an Amended Complaint within twenty (20) days of the date of this Order.

2. Counts II, III, IV and V are dismissed with prejudice.

3. West Brandywine Township Police Department is dismissed as a Defendant in this case.

4. Defendant shall file a responsive pleading to any Amended Complaint within ten (10) days after service of said Amended Complaint.

BY THE COURT:

/s/ MICHAEL M, BAYLSON

MICHAEL M. BAYLSON, U.S.D.J.